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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1691

WILLIAM J. RASMUSSEN, D.B.A. SARIVAL GUERNSEY FARMS, PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

No. 71-1690

MARLENE L. KRESSE, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Kresse App., pp. 13a-21a) is not yet reported. The opinion of the district court (Kresse App., pp. 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1972. The petitions for writs of certiorari were filed on June 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937 provides that a handler regulated by a marketing order issued pursuant to the Act may challenge that order in an administrative proceeding before the Secretary of Agriculture. 7 U.S.C. 608c(15)(A). The Act further provides that if a handler is dissatisfied with the Secretary's decision, he may then obtain judicial review of that decision in the appropriate federal district court. 7 U.S.C. 608c(15)(B).

The questions presented are:

1. Whether a handler regulated by a marketing order may avoid the administrative proceedings and challenge the order directly in district court without exhausting his administrative remedies.

2. Whether, assuming the handler must exhaust his administrative remedies before bringing suit in his own name, he may nevertheless obtain direct district court review of the marketing order at the instance of an unincorporated consumer group which initiates a suit challenging the order on the same grounds advanced by the handler.

STATUTE INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, are set forth in an Appendix, *infra*, pp. 13–14.

STATEMENT

The Agricultural Marketing Agreement Act of 1937 authorizes the regulation of certain agricultural com-

modities, including milk and its products, which move in interstate commerce, through the issuance by the Secretary of Agriculture of marketing orders governing the handling of these commodities. 7 U.S.C. 608c. The Act further provides for administrative and judicial review of a marketing order at the behest of a handler who is regulated by the order in question. Specifically,

> [a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. 608c(15)(A).[1] If dissatisfied with the Secretary's ruling on the administrative petition, the handler may seek review of "such ruling" in the appropriate district court. 7 U.S.C. 608c(15)(B). No other provisions for the review of marketing orders are contained in the Act.

Petitioner Rasmussen is a milk handler subject to the provisions of the Central Arizona Marketing Order, 7 C.F.R. 1131. He brought this action challenging the marketing order in the district court, explaining his failure to exhaust first the administrative remedy provided by 7 U.S.C. 608c(15)(A) as follows (Rasmussen App. 6a):

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[1] Pending disposition of his petition for review, the handler may apply for a postponement of the effectiveness of an order or its application to him. 7 C.F.R. 900.70.

> The plaintiff has elected to exercise his rights to commence this proceeding rather than to file for Administrative review pursuant to 7 U.S.C. 608c(15)(A) because the case raises fundamental questions of statutory construction and Constitutional issues which this procedure will expedite and no effective purpose can be served by delay of the issue which will seriously and irreparably injure the Plaintiff and the public.

The complaint generally alleged that, in amending the Central Arizona order in 1969, the Secretary had exceeded his statutory authority and followed procedures which amounted to a deprivation of due process. Rasmussen App. 7a–9a.

At the same time, counsel for Rasmussen filed a second, substantially identical complaint challenging the marketing order on the same grounds advanced by Rasmussen. The plaintiffs in that action were the "Concerned Consumers," an unincorporated association who generally alleged that as a result of the amendments they would have to pay a higher price for a filled milk product manufactured by Rasmussen and regulated under the order. The actions were consolidated and disposed of together by the lower courts.

The district court dismissed Rasmussen's complaint for failure to exhaust the administrative remedy provided in 7 U.S.C. 608c(15)(A), and the court of appeals affirmed. The court based its decision on *United States* v. *Ruzicka,* 329 U.S. 287, where this Court held that review of agricultural marketing orders "in the first instance must be sought from the Secretary of Agriculture," even where legal and constitutional issues are raised. *Id.* at 294.

Petitioner Kresse's complaint was dismissed on the ground that consumers do not have standing to challenge marketing orders. The court of appeals affirmed, noting that Congress had provided for administrative and judicial review only at the instance of handlers regulated by the order involved, 7 U.S.C. 608c(15), and that the structure and purpose of the Act indicated that consumers were not intended by Congress to have standing to seek review (Kresse App. 20a):

> Had Congress intended to allow consumers to attack provisions of a marketing order, it would have required them to pursue the administrative remedy provided in Section 608c (15)(A). By limiting the administrative remedy to handlers, Congress necessarily intended that the judicial remedy be similarly limited in scope.

The court observed that permitting suits by consumers would enable a handler to avoid the statutory administrative remedy by inducing a consumer group to bring suit on his behalf. It pointed out that the "identity of the complaints and of counsel for all appellants in these cases points up the possibility." *Ibid.*

ARGUMENT

1. *Rasmussen.*

The courts below properly dismissed petitioner Rasmussen's complaint for failure to exhaust his administrative remedies. In the plainest terms possible, the Agricultural Marketing Agreement Act conditions the right of a handler to seek review of the legality of a marketing order upon prior exhaustion of the statutory administrative remedy. Section 8c(15) of

the Act, which grants the district courts jurisdiction to review marketing orders, provides an administrative remedy to be invoked by filing a petition with the Secretary; once he renders a decision on the petition, the district courts "are vested with jurisdiction in equity to review such ruling * * *." 7 U.S.C. 608c(15)(B). Another provision vests jurisdiction in the district court to enforce marketing orders upon the Secretary's complaint. 7 U.S.C. 608a(6). Together, these provisions "establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." H. Rep. No. 1241, 74th Cong., 1st Sess., p. 14.

This Court squarely rejected an attempt by a handler to litigate the validity of a marketing order without first exhausting the administrative remedy provided in Section 8c(15)(A) in *United States* v. *Ruzicka*, 329 U.S. 287. After analyzing "the provisions of the Act that distribute enforcement authority between the courts and the Secretary of Agriculture" (329 U.S. at 288), this Court concluded (*id.* at 294):

> Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his ruling,

and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts.

While *Ruzicka* arose in the context of a handler's defense to an enforcement action, this Court's holding that "the remedy in the first instance must be sought from the Secretary of Agriculture" applies with at least equal force to any suit by a handler seeking initial review from the courts. In either situation, the legislative determination that the Secretary is the exclusive "expert forum" (329 U.S. at 292) for initially contesting marketing orders requires that the district court refuse to entertain any complaint which a handler has not first presented to the Secretary.[2]

Petitioner Rasmussen asserts that this suit is authorized by what he denominates as the Act's "savings clause," 7 U.S.C. 608a(8), which provides that the remedies set forth in Section 8a are "in addition to" other remedies "existing at law or in equity." Rasmussen Pet. 10–12. This Court held in *Ruzicka, supra,* that "that section adds to the Government's remedies.

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[2] The courts of appeals have consistently followed *Ruzicka*, rejecting in a variety of situations attempts by handlers to litigate the validity of marketing orders without exhausting the administrative remedy. *E.g.*, *Willow Farms Dairy, Inc.* v. *Benson*, 181 F. Supp. 798 (D. Md.), affirmed on opinion below, 276 F. 2d 856 (C.A. 4); *United States* v. *Ideal Farms, Inc.*, 162 F. Supp. 28, 30 (D. N.J.), affirmed, 262 F. 2d 334 (C.A. 3); *United States* v. *Yadkin Valley Dairy Cooperative, Inc.*, 209 F. Supp. 634, 636 (M.D. N.C.), affirmed on opinion below, 315 F. 2d 867 (C.A. 4); *Panno* v. *United States*, 203 F. 2d 504, 508 (C.A. 9); *United States* v. *Turner Dairy Co.*, 166 F. 2d 1 (C.A. 7), certiorari denied, 335 U.S. 813; accord, prior to *Ruzicka: La Verne Co-op Citrus Association* v. *United States*, 143 F. 2d 415, 418 (C.A. 9).

It implies no judicial review in favor of handlers." 329 U.S. at 291, n. 2.

2. *Kresse.*

Petitioner Kresse asserts primarily that the decision below denying standing to consumers to attack the provisions of a marketing order conflicts with the holding in *Harry H. Price & Sons, Inc.* v. *Hardin,* 425 F. 2d 1137 (C.A. 5), certiorari denied, 400 U.S. 1009. In our view, the decisions are in conflict only if *Price* is given the broadest possible reading; even then, we do not believe this case is an appropriate one for resolving the conflict.

The court in *Price* concluded that a tomato wholesaler who was unable to continue his business because of limitations upon tomato marketing imposed by a marketing order had standing to challenge the order under this Court's decisions in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, and *Barlow* v. *Collins,* 397 U.S. 159. In those cases, this Court held that in addition to finding injury in fact, the court must determine whether the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute," 397 U.S. at 153; in addition, "the Court must decide if Congress has in express or implied terms precluded judicial review," 397 U.S. at 165.

In *Price,* the Fifth Circuit resolved the zone of interest issue in favor of the wholesaler, concluding that Price "has been a handler of tomatoes of the kind and size the marketing of which is indirectly affected by the orders and regulations, and it was in the marketing chain of such tomatoes between pro-

ducer and consumer." 425 F. 2d at 1140.[3] It was on this basis alone that the court concluded that Price had standing.

In reaching that conclusion, the Fifth Circuit did not address itself to the additional consideration raised in *Barlow, supra:* whether Congress had implicitly precluded judicial review at the instance of a non-handler when it limited administrative and judicial review of marketing orders to handlers through 7 U.S.C. 608c(15). In our view, for the reasons set forth at length in the government's petition for certiorari in *Hardin* v. *Harry H. Price & Sons, Inc.,* No. 859, O.T. 1970, Congress intended that only handlers be able to challenge administratively, and then judicially, marketing orders issued under the Act.

The court below, addressing itself only to the issue which was not touched on by the Fifth Circuit,[4] con-

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[3] Thus, Price was found to be within the "zone of interests" of the Act because he was in the "marketing chain," the regulation of which is accomplished through marketing orders. The consumers involved here are not within that marketing chain, and therefore would not appear to be within the zone of interests. The court below expressed doubt that "the Fifth Circuit would extend its holding to consumers." Kresse App. 20a. The court also analyzed the substantive provisions of the Act, noting that "the whole structure of the Act contemplates a cooperative venture between the Secretary, the producers, and handlers." Kresse App. 19a.

[4] This Court's decisions in *Association of Data Processing Service Organizations* and *Barlow* were handed down while the *Price* case was under submission, and therefore the relevance of the decisions was not briefed by either party prior to the Fifth Circuit's decision.

cluded that if Congress had intended to permit consumers to challenge marketing orders, "it would have required them to pursue the administrative remedy," and that by "limiting the administrative remedy to handlers, Congress necessarily intended that the judicial remedy be similarly limited in scope." Kresse App. 20a. The court buttressed this conclusion by noting that (1) the Act does not expressly give consumers any right to participate in any proceeding, and their interest in lower prices is contrary to the Act's purpose of increasing farm prices; (2) permitting consumers to sue directly would enable a handler to avoid the administrative proceeding; and (3) permitting direct suits by consumers would frustrate the plain legislative intent that the Secretary first apply his expertise to the issues concerning the legality of a marketing order. Kresse App. at 19a–20a.

Thus, the decision below does not conflict with the precise holding or with the reasoning in *Price,* for the Fifth Circuit did not consider the factors which the court below found decisive. And, in light of the basis on which the court found standing in *Price,* we think it unlikely it would reach the same result if the issue of consumer standing were before it.

Moreover, we believe that the present case is a particularly inappropriate one for resolving the extent to which Section 8c(15) bars judicial review by nonhandlers in general. The context in which this case arises makes it apparent that the consumer suit was intended, in part at least, to enable the handler to circumvent the requirement that he exhaust his ad-

ministrative remedies. The consumers' allegations are almost *verbatim* those of the handler's complaint, and the suit was brought by the handler's counsel. Both courts below commented that permitting the consumer suit to be maintained would "provide a handler with a convenient device for evading the statutory requirement." Kresse App. 20a, 11a.

In these circumstances, we believe the petition for certiorari should be denied. When the handler files the petition for administrative review of the marketing order, the consumers are permitted to participate through filing a brief and presenting arguments. 7 C.F.R. 900.57. Should the decision be adverse to the handler, he may bring an action in the district court, and the consumers may intervene under the provisions of Rule 24(b), Fed. R. Civ. P. In this way the court's consideration of "the intricate business of milk control" (329 U.S. at 292) would be facilitated by having the administrative decision as to the challenged amendments before it, as Congress intended.

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied.

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SEPTEMBER 1972.

APPENDIX

The relevant provisions of Section 8c of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 247, as amended, 7 U.S.C. 608c, are as follows:

> (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.
>
> * * * * *
>
> (15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.
>
> (B) The District Courts of the United States in any district in which such handler is an in-

habitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

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